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VIA Electronic Mail

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Mr. Taylor Scott Amarel
MuckRock News
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Re: Final Appellate Determination Granting FOIA Appeal No. 2019-0472

Dear Mr. Amarel:

This letter constitutes the final determination of the Consumer Financial Protection Bureau regarding your appeal of the Bureau's response to Freedom of Information Act (FOIA) Request CFPB-2019-0472-F (the Request).¹ For the reasons set forth below, the appeal is granted.

I. Background

On September 11, 2019, the Bureau received the Request seeking all emails sent to, from, or copied to the address whistleblower@consumerfinance.gov, containing "the following non-case-sensitive keysting in the content or headers of the emails, 'big data', 'surveillance', 'machine learning', 'CCTV', or 'automated intelligence'." The Request asked that the search be limited to January 1, 2014 through January 1, 2018.

¹ The Bureau's FOIA regulations are codified at 12 C.F.R. §§ 1070.10 *et seq.* Pursuant to these regulations, the authority to determine FOIA appeals rests with the Bureau's General Counsel or her delegate. *See* 12 C.F.R. § 1070.21(e). The General Counsel has delegated to me the authority to determine the appeal of the Bureau's response to the Request. This letter therefore constitutes the Bureau's final response to the Request.

On September 12, 2019, the Bureau transmitted its response to the Request (the Response) stating “Please be advised that I can neither confirm nor deny the existence of any records responsive to your FOIA request.” On October 9, 2019 you filed this appeal challenging the failure to produce responsive records.

II. Appellate Determination

Under FOIA a person may request and obtain federal agency records that are not protected from disclosure by one of FOIA’s nine exemptions. 5 U.S.C. § 552. As a general rule, in response to a request for records, an agency must acknowledge the existence or non-existence of responsive records and it must provide the specific FOIA exemptions relied upon to withhold all or part of any responsive records. *Id.*

However, FOIA’s “exemptions cover not only the content of protected records but also the fact of their existence or nonexistence, if that fact itself properly falls within the exemption.” *Larson v. Dep’t of State*, 565 F.3d 857, 861 (D.C. Cir. 2009). An agency may, therefore, “refuse to confirm or deny the existence of records where to answer the FOIA inquiry would cause harm cognizable under a[] FOIA exception.” *Wolf v. CIA*, 473 F.3d 370, 374 (D.C. Cir. 2007) (internal quotation marks and citation omitted). Such a Glomar response is appropriate when confirmation of the existence of a record would cause the very harm that a specific exemption is intended to prevent.

“To properly employ the Glomar response to a FOIA request, an agency must ‘tether’ its refusal to respond to one of the nine FOIA exemptions.” *Wilner v. Nat’l Sec. Agency*, 592 F.3d 60, 68 (2d Cir. 2009) (internal citation omitted). To determine whether an agency’s Glomar response is appropriate, “courts apply the general exemption review standards established in non-Glomer cases.” *Wolf*, 473 F.3d at 374. In the Glomar context, those “general exemption review standards” are considered to determine whether the existence or non-existence of the requested records is itself protected from disclosure by one of FOIA’s nine exemptions. *See generally Wolf*, 573 F.3d at 370.

Here, the Bureau’s Response refused to confirm or deny the existence of records responsive to the Request, but it did not “tether” its Glomar response to one of the nine FOIA exemptions. Moreover, because the keywords specified in the Request do not appear to relate to a particular person or company, it is not clear how confirming or denying the existence of such records would cause harm cognizable under a FOIA exemption. *See generally, Wolf* 473 F.3d at 374. It is not possible to determine whether a Glomar response is appropriate without considering it in light of a specific FOIA exemption.

Accordingly, the Appeal is granted and the Request is remanded for reprocessing. If in reprocessing the Bureau again determines that a Glomar response is appropriate, it must tether that response to a FOIA exemption by explaining why the existence or non-existence of records is protected from disclosure by the exemption.

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If you are dissatisfied with the Bureau's final appellate determination, you may contact the Office of Government Information Services (OGIS), which offers mediation services to resolve disputes between FOIA requesters and Federal agencies pursuant to 5 U.S.C. § 552(h)(3). Using OGIS services does not affect your right to pursue litigation.

Steven Y. Bressler
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Litigation and Oversight